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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 362

NICK MASICH,

Appellant,

vs.

UNITED STATES SMELTING, REFINING AND MINING COMPANY AND F. S. MULOCK

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 362

NICK MASICH,

Appellant,

vs.

UNITED STATES SMELTING, REFINING AND MINING COMPANY, A CORPORATION, AND F. S. MULOCK,

Appellees

ON APPEAL FROM THE SUPREME COURT OF UTAH

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

As provided for in Rule 7(3) of this Court, appellees submit this statement disclosing matters making against the Court's jurisdiction and move that the appeal be dismissed.

Opinions Below

The trial court, the District Court of the Third Judicial District of Utah, filed no opinion. The opinion of the Supreme Court of Utah is reported at 191 P. 2d 612 (1948).

Nature of the Case and Proceedings Below

Appellant initated this action by filing suit against appellees for a declaratory judgment in the District Court of the Third Judicial District of Utah. In essence, he alleged that through appellees' negligence he had incurred silicosis while employed at a Utah mine operated by the appellee, United States Smelting Refining and Mining Company,[1] and that as a result thereof his health had been permanently impaired though not to the extent of rendering him totally disabled. His prayer was that he be declared to have an action at law against the appellees notwithstanding the provisions of the Utah Occupational Disease Disability Law, Utah Code Ann., c. 1A, tit. 42 (1943), as amended, 1945 Laws of Utah, c. 66, p. 145.

Appellees denied negligence and pleaded also that the Occupational Disease Disability Law vested in the Industrial Commission of Utah exclusive jurisdiction of any claim appellant might have.[2]

By stipulation the trial, before a judge only, was limited to the question of whether the statute barred appellant from suing either or both appellees for damages at law.

The trial court held that the statute conferred on the Industrial Commission exclusive jurisdiction of appellant's alleged claims.

On appeal, the Supreme Court of Utah affirmed the judgment, one judge concurring specially and one dissenting. The Industrial Commission seemingly has authority to di-

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[1] The appellee Mulock is Vice President and General Manager of Western Operations for the corporate appellee. For present purposes both appellees may be considered to stand in the same legal position.

[2] Certain other denials and affirmative defenses, not relevant to this appeal, were also pleaded. In addition, the answers noted that appellant then had pending before the Industrial Commission a claim for compensation for total disability resulting from silicosis contracted while in the corporate appellee's employ.

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rect an employer to pay compensation to an employee who has incurred silicosis in the course of his employment only if the employee is totally disabled thereby, but in such cases the duty to pay is absolute and the employer's lack of negligence irrelevant. Thus the Occupational Disease Disability Law, as construed below, shifts certain burdens from employees to employers in the most serious cases and certain burdens from employers to employees in less serious cases.

On June 29, 1948, the Supreme Court of Utah denied without opinion appellant's petition for a rehearing, and on September 17, 1948, Chief Justice McDonough allowed an appeal to this Court. The statutory provision asserted to sustain jurisdiction is that part of 28 U. S. C. Sec. 344 (1946) which has been carried over into 28 U. S. C. Sec. 1257 by the Act of June 25, 1948.

The Federal Questions Were Not Seasonably Raised

Appellant now contends that the Utah Occupational Disability Act, as construed by the Utah courts, violates the following provisions of the United States Constitution: the privileges and immunities clause of Art. IV, Sec. 2; the due process clause of the Fifth Amendment; the privileges and immunities clause of the Fourteenth Amendment; the due process clause of the Fourteenth Amendment; and the equal protection clause of the Fourteenth Amendment.

It is clear that none of these Federal questions were either raised in season or considered by the Supreme Court of Utah; hence, beyond stating that we do not believe them to be substantial, we will not burden the Court with a discussion of the merits.

At no place in the record is there the slightest indication that appellant invoked any provision of the United States Constitution prior to the time he prepared his petition for rehearing in the Utah Supreme Court.

Neither the pleadings nor the assignment of errors to the Utah Supreme Court contains any reference to constitutional issues, state or Federal.[3]

Nor is there anything in the judgment of the trial court or the three opinions by members of the Supreme Court of Utah to suggest that a Federal question was considered by either court *sua sponte*.

Appellant quotes a passage from the Utah Supreme Court's majority opinion as evidence that the court sustained the validity of the Act against a claim that it was repugnant to the Federal Constitution (See Statement as to Jurisdiction, p. 21.) The quotation supports no such conclusion. This Court will not presume that a state court has decided a Federal constitutional question merely because that court's opinion makes use of the words "constitutional" and "unconstitutional";[4] refers generally to the "due course of law";[5] or includes a summary of a case dealing with a Federal question somewhat similar to that sought to be asserted.[6] The only part of the quotation in

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[3] Appellant says that he "contended" before the Utah Supreme Court that the trial court's construction of the statute was "unconstitutional." Even if reference to briefs and statements extrinsic to the record were not unavailing to show that a federal question was raised (*Lynch* v. *New York*, 293 U. S. 52, 54 (1934)), the mere use of the word "unconstitutional" is insufficient to raise a federal question in a state court. *Kipley* v. *Illinois*, 170 U. S. 182, 186-7 (1898). Moreover, it turns out upon inspection of the appellant's main and reply briefs that the only constitutional reference contained therein is to Art. VI, Sec. 23 of the Utah Constitution.

[4] Cf. *Kipley* v. *Illinois*, 170 U. S. 182, 186-7 (1898); *Miller* v. *Cornwall R.R.*, 168 U. S. 131, 134 (1897).

[5] As indicated in the text, *infra*, Utah has a constitutional provision which uses the expression "due course of law." Cf. *Bowe* v. *Scott*, 233 U. S. 658, 664-5 (1914).

[6] *Osborne* v. *Clark*, 204 U. S. 565, 567-8 (1907); *Levy* v. *Superior Court*, 167 U. S. 175, 177 (1897). Reference to a case dealing with the federal right an appellant seeks to assert in this Court is, of course, a factor relevant to a determination of whether the state court did decide the federal question; and, when combined with other factors of similar purport, it may indicate that the question was decided. See *Bryant* v. *Zimmerman*, 278 U. S. 63, 67-9 (1928).

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which appellant could conceivably find comfort is the last sentence, in which mention is made of the state's police power. Even the portion of the opinion quoted by appellant, however, reveals that the Utah court was making but a passing comment on the basis on which the general scheme of workmen's compensation acts had been held not to offend the Federal Constitution. In so many words the quotation shows that the Constitution with which the court was concerned was "the Constitution of this state." Were there any doubts on this point, they would be set to rest by the following passage which occurs at the place where appellant has resorted to asterisks:

> ". . . There are two provisions of our Constitution which have been interpreted in Workmen's Compensation litigation. Section 5, Article XVI, which involved the right to sue for wrongful death, is no longer involved so we are now only concerned with Section 11, Article I, which provides: 'All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.' " 191 P. 2d 612, 623-4 (See Statement as to Jurisdiction, p. 51).

In his petition for rehearing, appellant did rely on the Federal Constitution. The Supreme Court of Utah, however, did not entertain the petition or reply to the new Federal arguments. And it is well settled that a claim of Federal right first asserted in a petition for rehearing is not timely unless the state court in ruling on the petition expressly passes on the question or unless the original ruling of the court could not have been anticipated.[7] The

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[7] *Herndon* v. *Georgia*, 295 U. S. 441, 443-4 (1935); *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 163-4 (1932). In preparing his petition for re-

present case is within neither exception to the general rule.

The four cases on which appellant relies to sustain his contention that the Federal questions were raised in season are not in point.

Great Northern R. Co. v. *Sunburst Oil and Refining Co.*, 287 U. S. 358 (1932), is one of a line of cases holding that it is not too late to raise the Federal question in a petition for rehearing where "the grounds of the decision [by the highest state court] supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right. . . ." *Id.* at 366-7. In the instant case the Supreme Court upheld the lower court's construction; there was no "surprise" element.

In *San Josè Land and Water Co.* v. *San Josè Ranch Co.*, 189 U. S. 177 (1903), the Federal question not only appeared in the assignment of errors to the state supreme court, but was also fully considered in the opinion of that court and decided adversely to the plaintiff in error. Neither of these factors is present in this case.

Yazoo and Mississippi V. Ry. v. Adams, 180 U. S. 1 (1901), is not entirely clear on the pertinent jurisdictional point and there are no subsequent citations to it to aid understanding. The decision seems, however, to have been grounded on the Court's belief that a Federal question, though not set forth explicitly, was so close to the heart of the case that the state supreme court necessarily passed on it in reversing the trial court's judgment. *Id.* at 9-16. In the present case, on the other hand, there is no reason at all for concluding that any Federal question was necessarily determined.

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hearing, appellant seems to have recognized the jurisdictional defect. The last three paragraphs of the petition constitute a virtual acknowledgment that he could not bring the case here unless the Utah court entertained the petition and ruled on the federal questions.

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The applicability of *Telluride Power Transmission Co.* v. *Rio Grande Western R. Co.*, 175 U. S. 639 (1900), escapes us.

Conclusion

In sum, the appellant has not carried his burden of showing affirmatively that the Court has jurisdiction. See *Memphis Gas Co.* v. *Beeler*, 315 U. S. 649, 651 (1942).

The appeal should be dismissed for want of jurisdiction.

Respectfully submitted,

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